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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re

Amendment of Part 74 of the
Commission's Rules with Regard
to the Instructional Television
Fixed Service

MM Docket No. 93-24

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To: The Commission

COMMENTS OF HEARTLAND WIRELESS COMMUNICATIONS, INC.

Heartland Wireless Communications, Inc. ("Heartland"), by its attorneys and pursuant to Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-24 (released July 6, 1994) ("NPRM"), hereby files its Comments in the above captioned proceeding.

Background

Heartland, which became a publicly traded company in April 1994, operates eight wireless cable systems in Oklahoma, Texas and Louisiana. Several additional systems are under construction in Oklahoma, Kentucky, Missouri and Texas. In all, it is currently developing thirty-four markets in nine states with about 3.6 million homes seen. In addition, Heartland recently partnered with Cross Country Cable in a \$45 million acquisition of Ruralvision. When completed, this transaction will add substantially to Heartland's inventory of wireless cable systems which will extend from Illinois to Texas to Florida.

Heartland competes directly with hard-wire cable systems in each of its markets. It also hopes to reach significant numbers of unserved households in the small and mid-sized

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markets in which most of its systems are located. Heartland believes that it will be able to offer a first multichannel video programming service to over 1.4 million households which are unpassed by traditional hard-wire cable systems in its 34 operating or under development systems.

Heartland relies on excess capacity lease agreements with ITFS licensees in almost all the markets it operates. Fostering successful alliances with ITFS licensees and applicants is critical to Heartland's efforts to aggregate sufficient channel capacity to compete effectively with incumbent hard-wire cable operators. Maintaining mutually beneficial relationships with ITFS licensees is essential to Heartland's long-term viability. It is committed to making these partnerships work and proud of its record in this area.

Heartland fully endorses the NPRM's goal of enhancing the efficiency of the ITFS licensing process. It is supportive of most of the proposals set forth in the NPRM and encourages the Commission to explore vigorously procedures and policies that will allow wireless cable to compete effectively in the emerging multichannel video distribution marketplace.

I. The FCC Should Open ITFS Filing Windows At Least Four Times Each Year.

The wireless cable business is truly an industry in metamorphosis. With access to capital and programming, industry experts envision rapid growth in total subscribers, average penetration levels and industry revenue. Paul Kagan

Associates, Inc. estimates a seventeen fold increase in total annual revenues, from \$100 million to \$1.7 billion, between 1993 and 2001. It is clear, however, that this growth also must stand on a third leg -- access to channels. While the Commission must take steps to prevent abuses of the licensing process, enforcement must not become a cure which kills the patient. If inordinate Commission resources are devoted to enforcement and the licensing process becomes a litigious battleground, delay will be the only certain result. The FCC's real mission -- to provide consumers with home video programming distribution alternatives -- will go unrealized.

In recognition of the vitality of the wireless cable industry the FCC should open windows not less than four times each year. Sufficient resources should be made available to substantially complete application processing, at least with respect to those applications not in conflict with other applications filed during the particular window, during each three-month period. The adoption of the low power television practice opening a window approximately once each year would be particularly devastating to the wireless cable industry at this time. The FCC should assign additional staff during the first window to handle the demand that has built up since the adoption of the 1993 freeze on new ITFS station applications.

II. The Commission Should Not Impose Application Caps On Either Wireless Cable Operators Or National ITFS Filers.

The imposition of a cap on the number of applications in which a wireless cable operator could hold channel rights during each window is fundamentally misguided. The NPRM proposes and Heartland supports new policies to ensure that an ITFS applicant or the wireless cable operator on which it relies is financially qualified and that receive site institutions are committed to incorporating the programming proposed by the ITFS applicant in their curricula. If the Commission enforces these policies and the requirement that licensees promptly construct authorized facilities, the public will be fully protected from "frequency speculators." Bona fide ITFS applicants who partner with financially qualified and committed wireless cable operators will successfully develop their systems. The FCC can employ summary cancellation procedures where the wireless cable operator is either unwilling or unable to meet the eighteen-month construction deadline. If certain operators habitually fail to honor construction commitments or seek to assign lease rights for unconstructed stations, the Commission has ample powers to investigate and, as necessary, sanction abuses of the licensing process.

Additional Commission regulation in this area is unwarranted. A wireless cable operator is, technically, not a party to the ITFS application and the Commission

historically has not considered the qualifications of a wireless cable operator in assessing either the basic or comparative qualifications of an ITFS applicant. The substitution of one lessee for another is an issue about which the Commission has shown little or no interest. This approach makes eminent sense, given a wireless cable operator's limited contractual right to use excess airtime. Compliance with Commission rules and policies is ultimately and non-delegably borne by the ITFS applicant and licensee.

The adoption of an applicant cap would mark a radical departure from current Commission practice. No FCC policy is served by restricting a ready, willing and able wireless cable operator's efforts to develop mutually beneficial relationships with an ITFS-qualified institution. A cap would restrict the universe of wireless cable operators with which an institution could contract. This would, inevitably, limit competition in the lease negotiation process and the opportunity for ITFS-qualified entities to bargain for the very best terms they can obtain. In many situations a cap would effectively eliminate any chance that an ITFS-qualified entity could initiate distant learning programs in the near future. These results would clearly disserve educational applicants and their wireless cable lessees. No cap of any form should be adopted.

The NPRM proposes to treat those applications which have been tendered but not yet placed on an "A" cut-off list as

having been filed and cut off as of the close of the first window. In the event that the FCC does impose a wireless cable operator window application cap, Heartland urges the Commission not to count currently pending applications against the cap. Heartland has channel rights in a considerable number of applications which fall into this category. Many of these were filed to prevent the reallocation of ITFS spectrum to wireless cable operators. These Heartland-supported applications demonstrate a continuing interest in "vacant" ITFS channels, an action which was necessary to ensure that the FCC would not award these frequencies to wireless cable operators pursuant to Section 74.990-74.992 of the Commission's rules. Clearly, the Commission must adopt a transition rule which treats these ITFS applicants and Heartland fairly. Counting these applications against a cap would penalize Heartland for protecting ITFS spectrum and substantially foreclose its participation in the first window.

Excluding applications now on file from a cap is fully consistent with basic window filing principles. The tendering of these applications is a matter of public record. Other ITFS applicants which have an interest in these channels know that they must file competing applications during the first window. Thus, Heartland will be substantially disadvantaged with regard to these applications. This is precisely the outcome which a window filing procedure, where no applicant should have information about competing proposals, is designed

to eliminate. Accordingly, it would be fundamentally unfair for the Commission to treat these applications as counting against any cap which it may impose.

The Commission also should reject a cap on national ITFS filers. The ITFS comparative selection procedures substantially prefer local applicants. Heartland fully supports this policy. However, where the choice is between relying on a non-local applicant to deliver educational programming to accredited local institutions which desire to incorporate such programming into their curricula and having no ITFS service at all, Heartland respectfully submits that the FCC must favor the non-local applicant's proposal.

Major modification applications also should be excluded from any application cap. Modification applications are frequently necessitated by circumstances beyond the control of an ITFS licensee or its wireless cable operator lessee, such as the loss of a transmitter site. Moreover, the Commission should not create disincentives where a wireless cable operator desires to undertake a major technical change to improve service to ITFS receive sites and to wireless cable customers. If applications proposing such changes were to count against a restrictive cap, a wireless cable operator may be forced to conclude that its long-term viability compels it to seek first new station authorizations.

III. The Commission Should Adopt Expedited Processing Procedures Where A Wireless Cable Operator has Channel Rights To At Least 10 Licensed Or Cut Off And Unopposed Channels.

Heartland strongly supports the NPRM's proposal to create expedited processing standards where a wireless cable operator has aggregated a sufficient number of channels to offer a competitive video programming service. Heartland believes that only 12 channels of programming -- which includes local off-air VHF/UHF channels -- are required to launch service successfully in most of its markets. In one market, it currently operates with five MMDS and five off-air signals. It is in markets of this kind where expedited action on pending new station applications is most critical. Accordingly, the minimum channel aggregation threshold should not be set any higher than 10 channels.

Heartland believes that a six-month construction requirement is a reasonable quid pro quo for obtaining expedited action. The Commission may wish to consider requiring proof of equipment and transmitter site availability to restrict this process to applicants that have the highest likelihood of initiating service promptly.

Heartland empathically rejects the Wireless Cable Association proposal to require that an applicant hold rights to at least four MDS channels in order to obtain expedited processing. The critical issue is whether a wireless cable operator has sufficient channel aggregation to achieve market viability. Heartland is developing certain markets

exclusively on the basis of leased ITFS channel capacity, a strategy which fully conforms to FCC rules and policies. There is no principled basis on which to deny expedited processing to such applications.

Clearly, the WCA restriction is at odds with the direction of current policy. It is contrary to new Section 74.990-74.992 which permit wireless cable operators to hold ITFS frequencies in certain circumstances. New channel loading rules give added flexibility to both ITFS licensees and wireless cable lessees to meet the needs of educational receive sites and private customers with ITFS channels. The FCC's reorganizational efforts to consolidate ITFS and MMDS licensing functions will further obliterate the ITFS/MDS channel distinction. The WCA proposal is, at best, a historical curiosity which has no relevance to the future of ITFS service or the wireless cable industry.

IV. The Commission Should Develop A Separate Financial Qualifications Standard For Publicly-Traded Corporations.

Heartland supports the Commission efforts to clarify wireless cable operator financial qualification requirements. It believes that the broadcast model of a certification standard based on contemporaneous written documentation has much to recommend it. Heartland is extremely concerned, however, about significant regulatory oversight in this area unless and until the FCC has substantial evidence of abuse. At that point, the better course may simply be to focus

Commission resources on "problem" operators. Unless carefully approached, Commission activity in this area could consume substantial staffing and promote wasteful, anti-competitive and dilatory litigation.

In particular, Heartland urges the Commission to exempt from all financial documentation requirements those publicly traded wireless cable operators with a market capitalization of at least \$10 million. Heartland must hold itself accountable to its shareholders and the rigorous demands of the public securities market on a daily basis. Its ability to participate successfully in both the debt and equity capital markets conclusively demonstrate its financial qualifications. In these circumstances, the utility of an added layer of FCC regulatory involvement is dubious. Heartland is unaware of any public interest benefit that would be derived from the Commission's financial oversight of publicly traded companies. Accordingly, it should not impose any financial documentation requirements on such entities.

V. The FCC Should Adopt The NPRM's Technical Proposals To Limit Mutual Exclusivity Between Applications.

Heartland strongly supports a number of technical proposals contained in the NPRM that will help eliminate or mandate the resolution of potential interference issues between applicants. Specifically, Heartland supports the mandatory use of offset on a going forward basis to resolve predicted interference between applicants. It also supports

applying a new station applicant's protected service area request on a prospective basis only. The procedure proposed in the NPRM would appear to compel new station applicants to propose PSA protection when an application is filed as a precautionary strategy. In these circumstances, the Commission may be better served simply by providing PSA protection automatically to every ITFS application at the time it is tendered. Finally, Heartland is in general agreement with the proposal to provide protection only for those receive sites 35 miles or less from the transmitter. Rather than requiring a "showing of unique circumstances," however, protection should be routinely provided where an applicant demonstrates that it delivers an adequate strength signal to a receive site. Requiring prompt initiation of service to a protected receive site beyond the 35-mile limit should limit potential abuses of this policy.

Respectfully submitted,

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